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In the Supreme Court of the United States

October Term, 1970

No. 945

ROBERT J. MILITANA,

Petitioner,

vs.

UNIVERSITY OF MIAMI,

Respondent.

BRIEF IN RESPONSE TO SUPPLEMENTAL PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA DISTRICT COURT OF APPEAL, THIRD DISRICT

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MIAMI REVIEW — 371-4853 — 377-3721

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BRIEF IN RESPONSE TO SUPPLEMENTAL PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, STATE OF FLORIDA

PRELIMINARY STATEMENT

This brief is filed in response to a Supplemental Petition (hereinafter the "Supplemental Petition") filed herein seeking a Writ of Certiorari to the District Court of Appeal, Third District, State of Florida. The original Petition for Writ of Certiorari (hereinafter the "Petition") which was filed herein will be responded to separately.

For convenience, the Petitioner, Robert J. Militana, will sometimes be referred to herein as "Militana," and the Respondent, University of Miami, will be referred to as "University."

The following symbols will be used:

(A.) for Appendix to Petitioner's Supplemental Petition

(R.) for Record on Appeal in the Florida Third District Court of Appeal

(P.) for Petition for Writ of Certiorari

(S. P.) for Supplemental Petition for Writ of Certiorari

(Pl. Ex.) for Plaintiff's Exhibit

(Def. Ex.) for Defendant's Exhibit

(R. I.) for Record on Appeal of prior mandamus action between the parties hereto

CITATIONS TO OPINIONS BELOW

In addition to the Citations to Opinions Below contained in his original Petition, Militana includes in his Supplemental Petition a citation to the Opinion of the Supreme Court of Florida, July Term, A.D., 1966, Case No. 35,344, in which that Court denied Militana's Petition for a Writ of Certiorari to the Florida District Court of Appeal, Third District. (S. P. 2) (A. 6a)

Respondent submits that this citation is improper in that it concerns an opinion rendered in a prior separate litigation between Militana and the University.[1]

Specifically, the opinion of the Supreme Court of Florida to which Militana cites this Court in his Supplemental Petition involves an action filed by Militana in July, 1964, following his failure of a third year course of study. (A. 53a-60a) (R. I. 14, 15) At the close of all the evidence in that case the trial court entered a Peremptory Writ of Mandamus directed to the University requiring it to readmit Militana to the Medical School, promote him to the fourth year class, and enroll him for the ensuing school year. (A. 90a, 91a)

The University appealed the decision of the trial court to the Florida District Court of Appeal, Third District (A. 100a-102a) and, on March 31, 1966, the Appellate Court reversed the order of the trial court and held in part that mandamus was not a proper remedy available to Militana. (Def. Ex. K) On April 21, 1966, the Mandate of the District Court of Appeal was filed in the trial court. (Def. Ex. M)

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[1] A complete account of the two separate actions filed by Militana against the University may be found in Respondent's Statement of the Case, *infra*.

On May 3, 1966, Militana filed in the Supreme Court of Florida his Petition for Writ of Certiorari to the District Court of Appeal. (A. 7a-14a)[1] His Petition was denied by the Supreme Court of Florida on September 20, 1966. (A 6a) Thus, the time limit within which Militana could have petitioned this Court for a Writ of Certiorari was December 20, 1966[2] Militana did not file such a Petition.

Now, Militana seeks to avoid this jurisdictional time limit by asking this Court to consider as a part of this Supplemental Petition the decisions rendered in this prior case along with the decision of the Florida Third District Court of Appeal in the second action.[1] Petitioner should not be allowed to avoid the time limit for petitioning this Court in the first action simply by filing a second action and then asking this Court to consider in this Petition the decisions rendered in both actions.

In addition, the Opinion of the Florida Supreme Court Denying Militana's Petition For Certiorari was not introduced into evidence in the trial court in the second action and therefore is not a part of the Record which can be brought before this Court.

Respondent respectfully submits that the decisions rendered in the action instituted by Militana in July, 1964, should not be considered herein because they were not timely presented to this Court for its consideration and the denial of Certiorari by the Florida Supreme Court is

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[2]Pursuant to 28 *U.S.C.* §2101(c), Militana had ninety days from the date of the opinion of the Supreme Court of Florida in which to file his Petition in this Court for a Writ of Certiorari.

[1]The second action instituted by Militana was commenced by Amended Complaint filed May 24, 1967 (R. 1-3) or about five months after his deadline for petitioning this Court for a Writ of Certiorari in the first action.

not properly a part of the Record before this Court. Respondent further submits that these portions of Petitioner's Appendix to his Supplemental Petition which involve this prior action should be stricken and given no consideration by this Court.[4]

JURISDICTION

Respondent contends that this Court does not have jurisdiction to grant the Writ of Certiorari prayed for herein. However, since Petitioner failed to set forth in his Supplemental Petition, as well as his original Petition, the statutory basis upon which he seeks to invoke this Court's jurisdiction,[5] in order to aid the Court in determining whether it has jurisdiction Respondent states that since the Writ of Certiorari sought herein would be directed to a state court the only possible basis of such jurisdiction is 28 *U.S.C.* §1257(3).

Petitioner also states that he is petitioning this Court in accordance with *Callender v. Florida*, 380 U.S. 519, 85 S.Ct. 1325, 14 L.Ed. 2d 265 (1965). (S. P. 4). Since Petitioner does not disclose the purpose for which he cites *Callender*, Respondent can only speculate as to the applicability of the holding in that case to the Supplemental Petition filed herein.[6]

Callender was a memorandum decision granting a Petition for Writ of Certiorari to the Supreme Court of

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[4]Pages 6a through 120a of the Appendix to Petitioner's Supplemental Petition pertain entirely to the prior action and should be stricken from the Record before this Court.

[5]Such a statement is required by Rule 23 (1)(b)(iii) of the Rules of this Court (hereinafter "Rule").

[6]The Supplemental Petition contains only the statement that "Further, the Petitioner is Petitioning this Court in accordance with *Callender v. Florida*." (S. P. 4)

Florida and reversing the decisions below without opinion. Two cases are cited by the Court in support of its action—*Abernathy v. Alabama*, 380 U.S. 667, 85 S.Ct. 1101, 14 L.Ed. 2d 151 (1965), another memorandum decision, and *Boynton v. Virginia*, 364 U.S. 454, 81 S.Ct. 182, 5 L.Ed. 2d 206 (1960).

In *Boynton*, the Court held that it could properly consider on Certiorari a federal question which was not directly presented to the Court on Petition for Writ of Certiorari if:

(1) The question is directly related to the question Presented for review in the Petition, and

(2) It has been properly raised and preserved in the lower courts.[1]

Since none of the questions presented by Militana are directly related to any question which was raised in the lower Court, neither *Callender* nor *Boynton* provides any

[1] The specific holding *Boynton* was that the Court could properly consider the question of whether certain allegedly discriminatory acts violated the Interstate Commerce Act when the Question Presented in the Petition alleged only a violation of Article I, §8 of the United States Constitution, and the due process and equal protection clauses of the Fourteenth Amendment. After stating the rule that its review is limited to the Question Presented to it, the Court justified its extension of the rule under the particular facts of the case by stating that Certiorari had originally been granted "because of the serious federal questions raised concerning discrimination based on color, 361 U.S. 958, 4 L.Ed. 2d 541, 80 S.Ct. 584," and then pointing out that "Discrimination because of color is the core of the two broad constitutional questions presented to us by the Petitioner just as it is the core of the Interstate Commerce Act question presented to the (lower) courts." *Boynton* at 209.

support for Petitioner. Indeed, since these cases deal only with the situation where Petitioner has neglected to include in his Questions Presented certain questions raised in the lower court, Respondent does not understand the reason for which they are cited by Petitioner, since he has the right to present to this Court any question which was properly raised and preserved below.

QUESTIONS PRESENTED

Federal Question 1 Presented, properly expressed in the terms and circumstances of the case, is as follows:

> WHETHER A PRIVATE EDUCATIONAL INSTITUTION IS REQUIRED TO AFFORD A MEDICAL STUDENT AN ADMINISTRATIVE HEARING PRIOR TO HIS DISMISSAL FOR SCHOLASTIC FAILURE, WHEN THE STUDENT HAS NOT REQUESTED THAT HE BE GIVEN SUCH A HEARING.

Respondent has no objection *per se* to the form of the other Federal Questions Presented in the Supplemental Petition. Respondent submits, however, that these additional Federal Questions Presented are so far removed from the evidence in the Record which is properly before this Court and the questions that were raised in the lower courts that they cannot be meaningfully stated "in the terms and circumstances of this case."[1]

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[1] As is required by Rule 23(1)(c).

STATEMENT OF THE CASE

The University of Miami, a Florida corporation not for profit, is a private educational institution of higher learning consisting of undergraduate colleges and professional schools. The University's School of Medicine was founded in 1952 and since that time has developed into a fully-accredited and established school. The School of Medicine is fully accredited by the American Medical Association and it has full membership in the Association of American Medical Colleges. (R. I. Ex. 8)

The Petitioner, Robert J. Militana, applied for admission to the University's School of Medicine in the Fall of 1958 and was accepted for the school year commencing in September, 1959. (R. I. Ex. D)

An accurate statement of the history of the attendance of Militana at the University's School of Medicine during the period 1959 through the Summer of 1963, at which time he was first dismissed by the Executive Committee of the School of Medicine for academic failure, is set forth in the opinion of the Florida Third District Court of Appeal in Case No. 65-641, entitled *University of Miami v. Robert J. Militana*, reported at 184 So.2d 701 (Fla. 3d Dist. 1966) as follows:

> Militana was admitted to the University's School of Medicine in the Fall of 1959. At the end of his first academic year the Promotions Committee recommended that he be promoted to the second year on probation. After the second year the Promotions Committee recommended that he be given the opportunity of repeating the second

year. Militana repeated the second year and was promoted to the third year. At the conclusion of his third year Militana had a cumulative grade point average of 1.92—a grade point average of 4.00 is equivalent to an "A". The Promotions Committee recommended that he be promoted to the fourth year on probation, subject to additional satisfactory work and re-examination in Obstetrics-Gynecology and Pediatrics. During the Summer of 1963, Militana successfully completed the required work in Pediatrics. He did not successfully complete the work in Obstetrics-Gynecology. At the conclusion of his work in the Summer of 1963, the Executive Committee of the School of Medicine dismissed him for academic failure. (at 702, 703)

In April, 1964, the Dean of the University's School of Medicine appointed a special review committee to consider Militana's readmission to the University's School of Medicine. Militana suggested that a particular faculty member be appointed to this committee, and this suggestion was followed by the Dean. (R. 1061) Thereafter, the special review committee met and afforded Militana an opportunity to be heard during which Militana orally presented his appeal and submitted a twenty-nine page memorandum in support of his position. (Def. Ex. BB) After the hearing, the committee attempted to verify Militana's statements and in doing so determined that they could not be verified. (R. 784, 1062) The decision of the special review committee was to not readmit Militana to the University's School of Medicine. (R. 1062)

Subsequently, in July, 1964 Militana instituted an action in the Circuit Court in and for Dade County, Florida, seeking to be reinstated, promoted and enrolled for the next school year. (R. I 14, 15) The cause was tried without a jury. At the close of all the evidence, the Circuit Court took the matter under advisement, and thereafter entered its Final Order Awarding a Peremptory Writ of Mandamus (R. I. 875-882) pursuant to which a Peremptory Writ of Mandamus was issued directed to the University requiring it to forthwith readmit Militana to the School of Medicine, to promote him to the fourth year class and to enroll him in the ensuing school year. Consequently, Militana was readmitted to the School of Medicine for the fourth year of study commencing in September, 1965. (R. 568)

The University appealed the decision of the Circuit Court to the Florida Third District Court of Appeal and on March 31, 1966, the District Court of Appeal, after concluding that under the private contract between Militana and the University upon which the action was based promotion from one class to another was clearly within the discretion of the Faculty Promotion Committee, reversed the Order of the Trial Court that had directed the University to promote Militana to the fourth year class of the School of Medicine and enroll him during the ensuing year. (Def. Ex. K) On April 21, 1966, the Mandate of the District Court of Appeal was filed with the Lower Court. (Def. Ex. M)

On April 28, 1966, the Executive Committee of the School of Medicine met to consider the case of Militana and to decide the question of whether Militana should be dismissed from student status since the Peremptory Writ

of Mandamus had been vacated. (R. 887; Def. Ex. N) At that meeting a motion passed unanimously that the Executive Committee of the faculty reaffirm its previous action of August 28, 1963, that Militana be dropped for academic failure. (Def. Ex. N)

On May 3, 1966, before the decision of the Executive Committee could be acted upon, Militana filed in the Supreme Court of Florida his Petition for Writ of Certiorari to the District Court of Appeal, which action had the effect of preserving the force of the Circuit Court's Order by which Militana was attending classes as a fourth year student. (Def. Ex. O) Thus, pursuant to the still controlling Circuit Court Order, Militana continued to attend the School of Medicine through the remainder of the academic year 1965-66, which ended on June 9, 1966. (Def. Ex. Q)

During this fourth year of Medical School, Militana had a quality point average of 1.79 and in academic standing was ranked 67 in a class of 67. (R. 885)

On June 9, 1966, the Executive Committee of the faculty of the University's School of Medicine held a duly-authorized meeting for the purpose of passing upon the graduation of all members of the senior class. (Def. Ex. R) At this time, proceedings involving the Petition for Writ of Certiorari were still pending in the Florida Supreme Court and the University was still subject to the Order of the Lower Court which had required it to promote and enroll Militana as a senior year medical student, all of which precluded the Committee's consideration of Militana's academic failure after the third year.

At this meeting, Militana's academic performance only as a senior medical student was discussed and reviewed. The record revealed that Militana had received a failing grade in Senior Year Medicine, a course of study which, as the applicable bulletin provided, was required for his graduation. Upon being advised that Militana had received a failing grade in Senior Year Medicine, the Executive Committee voted unanimously that he be dismissed for academic failure. (Def. Ex. R)

On September 20, 1966, the Supreme Court of Florida entered its Order denying the Petition of Militana for a Writ of Certiorari to the District Court of Appeal (Def. Ex. S) and, accordingly, on November 4, 1966, the Circuit Court entered its Final Judgment on the Mandate of the District Court of Appeal (Def. Ex. T) and vacated the Circuit Court Order pursuant to which Militana had attended the University's School of Medicine as a fourth year student, and adopted the Opinion and Mandate of the Third District Court of Appeal as the Order of the Circuit Court.

On December 13, 1966, the Executive Committee was informed that Militana had requested readmission to the School of Medicine. (Def. Ex. V) In light of the decision of the District Court of Appeal and the Lower Court's Final Judgment on the Mandate which then allowed consideration of Militana's first academic dismissal after the third year of medical school, the Executive Committee, upon motion and vote taken, declined to consider Militana for readmission to the School of Medicine.

Thereafter, Militana filed a second Complaint against the University in the Dade County Circuit Court alleging

that he had successfully completed the courses and work prescribed for a medical student and therefore was entitled to be graduated by the University as a Doctor of Medicine, and that the University had arbitrarily, capriciously and in bad faith refused to issue him a degree therefor. By Amended Complaint Militana prayed for a mandatory injunction compelling the University to issue him a degree of Doctor of Medicine. (R. 103)

The University defended on the grounds that it had dismissed Militana from the Medical School at the end of his third year of enrollment for academic failure and had taken like action for academic deficiency following his fourth year in the Medical School, which he undertook contrary to the desire of the University during the time when the District Court of Appeal's reversal of the Mandate Order was stayed pending Militana's Petition for Writ of Certiorari filed in the Supreme Court of Florida. (R. 7-23) On final hearing the Circuit Court found for the University and dismissed the cause. (R. 1269-1273)

Militana appealed the decision of the Circuit Court to the Florida Third District Court of Appeal. In an Opinion filed June 2, 1970, the District Court of Appeal adopted *in toto* the final judgment of the Circuit Court. (A. 124a-130a)

The Opinion of the District Court of Appeal, affirming the position of the University, stated in part that "The Plaintiff has failed to produce any evidence that the school acted in bad faith in its action in dropping him." (A. 127a)

The District Court of Appeal also clearly held that its decision in the first case prosecuted by Militana did not prevent the trial court's consideration and determination of the question of the failure, *vel non*, of Militana of his third year studies. (A. 128a, 129a)

It is from the decision of the Florida District Court of Appeal, Third District, in this second action, reported at 236 So.2d 162 (Fla. 3rd Dist. 1970), that Militana is petitioning this Court for relief.

SUMMARY OF ARGUMENT

Respondent respectfully submits that this Court does not have jurisdiction to grant Certiorari in this case for the following reasons:

1. A Writ of Certiorari directed to the Florida Third District Court of Appeal would be improper because that Court is not the highest state court in which a decision could have been had.

2. The final judgment sought to be reviewed rests on independent and adequate state grounds.

3. Militana did not properly raise in the trial court, or on appeal, the questions presented in his Supplemental Petition.

4. Militana's Supplemental Petition does not raise "federal questions" since there is no

evidence in the Record that the University's dismissal of Militana constituted "state action" or that any question of state or federal action was raised in the Courts below.

Respondent further submits that even if this Court finds that it has jurisdiction to consider the matters raised herein, the Court should decline to exercise this jurisdiction because the Petitioner's position with regard to his questions presented is so clearly without merit that it does not warrant serious consideration by this Court.

ARGUMENT

A. This Court Lacks Jurisdiction to Grant a Writ of Certiorari in this Cause.

The Petition and the Supplemental Petition filed by Militana in this cause fail to contain a statement of the statutory basis believed by him to confer jurisdiction on this Court to review by Writ of Certiorari the judgment in question.[3] However, since the Writ, if granted, would be directed to a state court, the only possible basis of jurisdiction is 28 *U.S.C.* §1257(3).

Under this statute, in order for the Court to have jurisdiction,

(1) The final judgment sought to be reviewed must have been rendered by the highest state court in which a decision could have

[3]Such a statement is required by Rule 23(1)(b)(iii).

been had, *Beilan v. Board of Public Ed., School Dist. of Phila.*, 357 U.S. 399, 78 S.Ct. 1317, 2 L.Ed.2d 1414, *reh. den.* 358 U.S. 858, 79 S.Ct. 10, 3 L.Ed.2d 91 (1957),

(2) The final judgment sought to be reviewed must not rest on independent and adequate state grounds, *Fay v. Noia*, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963),

(3) The question presented must have been properly raised and preserved according to state procedures, *Dill v. Ebey*, 299 U.S. 199, 33 S.Ct. 620, 57 L.Ed. 1148 (1913), and

(4) The question presented must raise a "federal question," *Durley v. Mayo*, 351 U.S. 277, 76 S.Ct. 806, 100 L.Ed 1178, *reh. den.* 352 U.S. 859, 77 S.Ct. 22, 1 L.Ed.2d 69 (1956).

Respondent submits that none of these requirements have been satisfied in the instant case.

1. *The Final Judgment Sought to be Reviewed was not Rendered by the Highest State Court in Which a Decision Could Have Been Had.*

Militana's Supplemental Petition prays that a Writ of Certiorari be granted to the Florida Third District Court of Appeal, which was the highest state court which heard this cause. (S. P. 3) Since the rights claimed by Militana in his Supplemental Petition question the validity of several federal and state statutes (S. P. 10,11) and

request a construction of his rights under the Florida and federal Constitutions (S. P. 10, 11), and since in order for these questions to be properly reviewable by this Court they must have been raised and decided adversely to Militana in the court below,[10] he had a right pursuant to Rule 2.1(5)(b) of the Rules of the Supreme Court of Florida[11] to appeal the Decision of the Third District Court of Appeal to the Florida Supreme Court.

The Florida Supreme Court is the highest state court in which a decision could have been had, and, accordingly, this Court does not have jurisdiction under 28 *U.S.C.* §1257(3) to issue a Writ of Certiorari in connection with this cause to any Court other than the Florida Supreme Court, *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 74 S.Ct. 396, 98 L.Ed. 583 (1954); *Stratton v. Stratton*, 239 U.S. 55, 36 S.Ct. 26, 60 L.Ed. 142 (1915).

2. *The Decision of the State Court from Which Relief is Sought Rests on Independent and Adequate State Grounds.*

This Court has consistently held that it will not review state court judgments which rest on independent and adequate state grounds, notwithstanding the presence of federal grounds. *Fay v. Noia*, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963); *NAACP v. Alabama*, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958); *Fox Film*

[10] See p.p. 19 - 21, *infra*.

[11] This Rule provides in part:
"Appeals from district courts of appeal may be taken to the Supreme Court, as a matter of right, only from decisions initially passing upon the validity of a state statute, a federal statute or treaty, or initially construing a controlling provision of the Florida or federal Constitution."

Corp v. Muller, 296 U.S. 207, 56 S.Ct. 183, 80 L.Ed. 158 (1935).

The Court has also refused to accept jurisdiction in those cases where the record was ambiguous as to whether the state court's decision rested on an adequate independent state ground as well as on a federal question.[12] *Lynch v. New York*, 293 U.S. 52, 55 S.Ct. 16, 79 L.Ed. 191 (1934); *Adams v. Russell*, 229 U.S. 353, 33 S.Ct. 846, 57 L.Ed. 1224 (1913).

The trial court, in dismissing Militana's action against the University, held in part that the action of the Florida Supreme Court in denying Militana's Petition for Writ of Certiorari in the first action brought by Militana against the University "leaves the University free to terminate appellee's student status in the Medical School." (A. 128a) On appeal Militana argued that this finding was error, (A. 139a) and the appellate court upheld the decision of the trial court. (A. 129a, 130a). In view of this independent state ground, this Court should refuse to take jurisdiction of this cause. *McCoy v. Shaw*, 277 U.S. 302, 48 S.Ct. 519, 72 L.Ed. 891 (1928); *Petrie v. Nampa and M. Irrig. Dist.*, 248 U.S. 154, 39 S.Ct. 25, 63 L.Ed. 178 (1918); *Eustis v. Bolles*, 150 U.S. 361, 14 S.Ct. 131, 37 L.Ed. 1111 (1893).

Prior to his dismissal after his third year of study, Militana was given a full and complete administrative hearing for which he was allowed to select the Chairman.

[12]However, in some cases where justice seemed to require it, the Court has remanded the case to the state court for a clarification of the basis of its holding. *Minnesota v. National Tea Co.*, 309 U.S. 551, 60 S.Ct. 676 84 L.Ed. 920 (1940); *Patterson v. Alabama*, 294 U.S. 600, 55 S.Ct. 575, 79 L.Ed. 1082 (1935).

(R. 1061) At the hearing he orally presented his position and submitted to the panel a twenty-nine page memorandum in support of his position. (R. 1061, 1062) Thus, Militana's Question Presented in his Petition, even if decided in his favor, would have no affect upon his dismissal since independent of the action taken with respect to his fourth year of study, he failed his third year and was afforded a full and complete administrative hearing thereafter. That is, assuming *arguendo* that this Court now should impose a hearing requirement for academic dismissal, such a requirement was fully met subsequent to this third year dismissal which is, of course, an independent and separate basis for refusal to award the degree.

Under the circumstances, any ruling issued by this Court pertaining to the Question Presented would be an advisory opinion. It is the Court's desire to avoid giving such advisory opinions that is the basis of its refusal to consider cases which rest on independent and adequate state grounds. *Herb v. Pitcairn*, 324 U.S. 117, 65 S.Ct. 459, 89 L.Ed. 789 (1945).

3. *The Federal Questions Presented were not Properly Raised and Preserved According to State Procedures.*

a. *The Questions were not raised at trial.*

In *Louisville and Nashville R.R. Co. v. Woodford*, 234 U.S. 46, 34 S.Ct. 739, 58 L.Ed. 1202 (1914), this Court held that where state procedure requires that a right be initially raised before the trial court in order to be reviewable on appeal, this Court does not have jurisdiction to consider by Writ of Certiorari an alleged violation of a

federal right which was not so raised. *Accord, Frank v. Volkommer*, 205 U.S. 521, 27 S.Ct. 596, 51 L.Ed. 911 (1907); *Spies v. Illinois*, 123 U.S. 131, 8 S.Ct. 21, 31 L.Ed. 80 (1887).

The Law of Florida is clear that an appellate court cannot consider questions which were not properly raised and determined in the trial court. *Radiation, Inc. v. Campbell*, 200 So.2d 192 (Fla. App. 1967); *Jackson v. Whitmore Construction Co.*, 202 So.2d 861 (Fla. App. 1967); State ex rel *Libby v. Coleman*, 5 So.2d 60, 62 (Fla. 1941). This Court has itself recognized this rule. *Mutual L. Ins. Co. v. McGrew*, 188 U.S. 291, 23 S.Ct. 375, 47 L.Ed. 480 (1902); *Mountain View Min. and Mill Co. v. McFadden*, 180 U.S. 533, 21 S.Ct. 488, 45 L.Ed. 656 (1900).

The evidence presented by Militana at trial dealt entirely with the question of whether he passed a course entitled Senior Year Medicine during his fourth year of study and whether the University acted in bad faith in deciding to dismiss him following his failure of this course.

A close reading of the entire Record below fails to disclose where any of the Federal Questions Presented were raised at any stage of the proceedings. Under Rule 23(f) Petitioner is required to state, with specific reference to particular portions of the Record, the precise manner in which each of the Federal Questions Presented were raised in the trial court. This Militana did not do and, due to the total lack of such evidence in the trial court record, cannot do.

In the absence of a showing that Petitioner raised the Questions at trial in accordance with state procedure,

the Questions cannot properly be reviewed by this Court. *Wolfe v. State of N. C.*, 364 U.S. 177, 80 S.Ct. 1482, 4 L.Ed.2d 1650, *reh. den.* 364 U.S. 856, 81 S.Ct. 29, 5 L.Ed. 2d 80 (1960).

b. *The Questions were not raised on appeal.*

The two Points raised by Militana's appeal from the trial court were that,

(1) The trial court erred in its determination that Militana's dismissal was based on academic failure alone (A. 138a), and

(2) The trial court erred in its determination that the University was justified in dismissing Militana based upon the decisions rendered in the previous action between the parties. (A. 139a)

None of the Federal Questions Presented by Militana are raised by these Points on Appeal, nor are they fairly comprised within these Points. In addition, none of these Questions were presented in Militana's argument to the appellate court. The Questions are presented for the first time in his Petition for Writ of Certiorari, (S. P. 4-9) and this fact clearly prevents this Court from properly considering them. *Cardinale v. Louisiana*, 394 U.S. 437, 89 S.Ct. 1162, 22 L.Ed.2d 398 (1969); *Worthy v. Moore County*, 76 U.S. 611, 9 Wall. 611, 19 L.Ed. 565 (1870).

4. *The Questions Presented Do Not Raise Federal Questions.*

Federal Questions I, II and VI Presented by the Supplemental Petition concern Militana's allegation that his

dismissal by the University violated his rights under the Fourteenth Amendment to the United States Constitution. (S. P. 4, 5, 9, 10)

However, this Court has consistently recognized the fact that the proscriptions of the Fourteenth Amendment apply only to "state action." *Rice v. Sioux City Memorial Park Cemetary*, 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897 (1955); *Hodges v. U.S.*, 203 U.S. 1, 27 S.Ct. 6, 51 L.Ed. 65 (1906); *Virginia v. Rives*, 100 U.S. 313, 10 Otto 313, 25 L.Ed. 667 (1880).

Neither the allegations of Petitioner's Complaint (R. 1-3), the evidence introduced at trial concerning his dismissal following his fourth year of study, nor the questions he raised on appeal (A. 138a, 139a) contain any evidence or allegations that the University's dismissal of Militana constituted "state action."

In the absence of any evidence in the Record before the Court that Militana properly raised the question of "state action" before the trial court and presented this question on appeal, this Court cannot properly consider any question based upon an alleged violation of rights under the Fourteenth Amendment.[11] *Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291, 23 S.Ct. 375, 47 L.Ed. 480 (1902).

[11]The question of whether certain connections between specific universities and federal and or state governments, such as the receipt of federal and state funds, are sufficient to justify deeming certain acts of "private" universities to be "state action" has been the subject of much recent litigation. *See: Torres v. Puerto Rico Junior College*, 298 F.Supp. 458 (D. Puerto Rico 1969); *Grossner v. Trustees of Columbia University in City of New York*, 287 F.Supp. 535 (S. D. N.Y. 1968). In each of these cases the written opinions of the courts involved indicate that the trial court received substantial evidence concerning the relationship between the institution involved and the state and/or federal government.

Federal Questions III, IV and V Presented all allege that certain state and federal statutes governing the licensing of physicians and the operation of medical schools are invalid. Each of these allegations is so clearly beyond the scope of the evidence introduced at the trial of this cause and the Points raised on appeal that the attempt by Petitioner to base his jurisdictional arguments on any of these points is so patently without merit as to not warrant a reply.

It should suffice to say that with regard to each of these Questions Presented Petitioner attacks the constitutionality of Florida and federal statutes that are not in the Record below, and at one point asks this Court to go outside the Record and take judicial notice of certain laws. (S. P. 7) Respondent respectfully submits that those portions of Petitioner's Appendix which contain copies of statutes and magazine articles which were not a part of the Record below are improperly before this Court and should be stricken from the Appendix.[14]

B. This Court, as an Exercise of Sound Judicial Discretion, Should Deny the Petition for Writ of Certiorari.

Even if the Court finds that jurisdiction exists to consider the matters raised by Petitioner Militana, the Court should, in the exercise of its discretion, deny the Petition for Writ of Certiorari because the "Federal Questions Presented" by Petitioner do not merit serious consideration by this Court. In this regard, Respondent will address itself individually to the "Federal Questions Presented" by Petitioner.

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[14]These portions include pp. 246a-493a of Petitioner's Appendix.

FEDERAL QUESTION I PRESENTED

Petitioner adopts the Question Presented in his original Petition as his Federal Question I Presented in his Supplemental Petition. In response thereto Respondent adopts herein by reference Section "B" of its Argument in its Brief in Response to Militana's Original Petition."

FEDERAL QUESTION II PRESENTED

Petitioner's second Federal Question Presented is in essence two separate questions. Part "A" involves Militana allegation that his dismissal by the University without being afforded an administrative hearing and appellate procedures is a denial of his rights under the Fourteenth Amendment to the Constitution of the United States. This question is basically a restatement of his Federal Question I Presented, and in response thereto, Respondent again adopts herein by reference Section "B" of its Argument in its Brief in Response to Militana's Original Petition.

Part "B" of Petitioner's Federal Question II Presented questions whether it is a violation of "due process" for a dismissal on academic grounds to be based on the opinions of professors. Respondent is not sure what criteria Petitioner believes should be substituted for the opinions of a student's professors in determining whether he has satisfactorily passed an academic course, or what other protections Petitioner may claim are imposed by the Fourteenth Amendment upon the process of giving grades to students based upon their academic performance.

"See pp 20 - 26 in Respondent's Brief in Response to Petition for Writ of Certiorari.

The Record in the instant case clearly demonstrates the amount of care taken by the University to be sure Militana was graded fairly. A review of the grading procedures in two of his classes will illustrate the point.

During his third year in Medical School Militana received grades of "D" in pediatrics and obstetrics-gynecology. (Pl. Ex. 9) As a result he was required to take additional summer work in these areas in order to raise his competency to an acceptable level. (R. 1020)

Dr. Decenzo, the professor who supervised this summer work, instructed the other attending physicians that Militana was to be given every opportunity to demonstrate his ability and they were to avail themselves of every opportunity to help him. (R. 1022)

At the conclusion of the Obstetrics-Gynecology course, Militana was offered the choice of a written or oral examination — he chose the former. (R. 1028) The examination was in three parts; each part prepared by a different instructor. (R. 1024) Prior to administering the examination, Dr. Decenzo reviewed it thoroughly and satisfied himself that it was fair, without repetition and concerned with material that the student had covered. (R. 1927) During the examination, he frequently looked in on Militana and offered to explain any questions which he did not understand (R. 1029) and at the conclusion of the examination, Militana thanked Dr. Decenzo and told him he thought it was a very fair examination. (R. 1029)

In an effort to be scrupulously fair in the grading of the examination, the following procedure was utilized. Dr. Decenzo graded each of the three parts and recorded a separate grade for each part. The physicians who prepared

the other two parts of the examination graded each part independently without knowledge of the other grades assigned, and recorded a separate grade for each part. (R. 1029) Finally, all three examination papers were given to the Department Chairman, Dr. Ferguson, who graded the whole examination. None of the grades came out passing.[16] (R. 1030)

Throughout his fourth year as a medical student, Militana's performance was carefully observed. In fact, the failing grade in Senior Year Medicine which Militana received, and which was one of the primary bases for his dismissal following his fourth year of study (Def. Ex. R), was determined primarily on the basis of Militana's performance in a clinic where he had daily close contact with, and supervision by, his professors. (R. 585, 586, 1080)

Specifically, the Senior Year Medicine course consisted of a student's participation in a clinic wherein he examined actual patients in the outpatient section of a hospital, made differential diagnoses of the pathological processes he would want to rule out by subsequent laboratory examinations[17] and decided the course of therapy which he would employ on the patient. (R. 585, 1080)

After the student examined the patient and drew his conclusions therefrom, he immediately met with his

[16]Militana's answers to the questions on this examination were described by Dr. Devenzo, who is a Diplomate of the American Board of Obstetrics and Gynecology and a Fellow of the American College of Obstetricians and Gynecologists (Def. Ex. Z) as not only wrong but bizarre. (R. I. 59A)

[17]"Differential diagnoses" are statements of the patient's possible illnesses, in order of the probability of their presence. On the basis of these diagnoses, tests are conducted to determine the particular illness with which the patient is afflicted. (R. 982, 983)

professor, out of the hearing of the patient, and discussed his findings and conclusions. (R. 86, 1080)

The professor and the student then returned to the patient and the professor verified the student's findings. (R. 586, 1081) The professor and the student then left the patient again and discussed the final diagnosis and therapy upon which the patient would be treated. (R. 586, 1081)

During his participation in Senior Year Medicine, Militana engaged in the above procedure with three different professors (R. 592) and each of these professors independently evaluated Militana's performance. (R. 936, 976) This evaluation was done immediately following each instance when Militana examined a patient, rendered a diagnosis, and conferred with a professor. (R. 1083) At the end of the semester these professors met and discussed their evaluations, and finally arrived at a recommended grade for the course. (R. 976) Testimony in the Record clearly established that this means of grading, based on daily observation of the student, was a far superior means of arriving at a grade in a course of that nature than the use of oral or written examinations. (R. 966)

Moreover, Militana had ample opportunities to discuss his status with, and obtain help and counseling from, his professors (R. 1022) as well as with Medical School administrators. (R. 923-925)

Respondent submits that the grading procedures employed by the University in the instant case were scru-

pulously fair and clearly did not constitute a denial of Militana's rights under the due process clause of the Fourteenth Amendment (assuming *arguendo* that this Amendment applies to the University).

In his argument on this Question Presented Petitioner cites *Mustell v. Rose*, 282 Ala. 358, 211 So.2d 489, *cert. den.* 393 U.S. 936 (1968), for the proposition that a medical student has no judicial recourse if his rights are violated by an educational institution. Petitioner then cites a "quotation" from *Mustell* in which the court apparently holds that the complaint therein failed to state a claim upon which relief could be granted. (S. P. 14)

While the statement cited by Petitioner is an accurate quotation of one of the "headnotes" contained in the unofficial report of the case,[18] the headnote is not a clear statement of the holding of the case in that it implies that the complaint was *per se* insufficient when in fact the court specifically held that the matter had been properly before the lower court because the complaint alleged that the university's dismissal of the plaintiff was arbitrary and capricious. *Mustell* at 494. In fact, the appellate court carefully reviewed the evidence presented in the trial court and upheld the trial court's decision in favor of the university because the evidence failed to disclose that the university had acted in an arbitrary or capricious manner. *Mustell* at 497.

The court clearly held that if the university had acted in an arbitrary or capricious manner the plaintiff would have been entitled to relief. *Mustell* at 498. Thus, Peti-

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[18]Headnote 6, at 211 So.2d 489.

tioner's plea that he has "no democratic process available . . . to protect himself" (S. P. 15) is refuted by the case he himself cites in support of his argument.

If it is Petitioner's position that courts should interfere in the academic affairs of educational institutions even when there is no showing that the institution acted in bad faith or in an arbitrary or capricious manner, Respondent submits that the courts are not properly trained to substitute their judgment of a student's performance for that of his professors. *Connelly v. University of Vermont and State Agr. College*, 244 F. Supp. 156 (D. Vt. 1965). Nowhere is this fact clearer than in the case of a medical school.

As the court pointed out in People ex rel. *Pacella v. Bennett Medical College*, 205 Ill. App. 324 (1917):

> The rule of judicial nonintervention in scholastic affairs is particularly applicable in the case of a medical school. A medical school must be the judge of the qualifications of its students to be granted a degree; Courts are not supposed to be learned in medicine and are not qualified to pass opinion as to the attainments of a student in medicine. *Id.* at 324, 325.

Where, as in the instant case, the action of the educational institution is not arbitrary, capricious or in bad faith,[19] courts should not intervene in the matter.

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[19]The trial court specifically found that the University's dismissal of Militana was not arbitrary, capricious or in bad faith. (A. 127a)

FEDERAL QUESTION III PRESENTED

Federal Question III Presented contains three separate questions. Parts "A" and "B" allege that the Florida statutes governing medical practice[20] and non-profit corporations[21] "are in part unconstitutional, partially null, partially void and of inconsequential effect" in that they violate Sections 2 and 9 of Article I of the Constitution of the State of Florida and the Fourteenth Amendment to the Constitution of the United States.

The Supplemental Petition does not disclose the basis of these alleged violations of the Florida and federal Constitutions. Faced with nothing more than the bare allegation that these statutes are unconstitutional, Respondent cannot adequately respond to the merits of the contention.

Part "C" of the Federal Question III Presented alleges that certain federal statutes are unconstitutional because they fail to require medical schools to give their students the protections of the Fifth Amendment to the Constitution of the United States in order to be eligible to receive federal funds. Petitioner's argument on this point is that since the Department of Defense has established a procurement policy of requiring private industry to abide by "equal opportunity" in order to be eligible for government contracts, medical universities should be bound by the due process clauses of the Fifth and Fourteenth Amendments. Petitioner does not cite any authority in support of his position that the policy established by one governmental agency imposes a constitutional mandate on all other agencies to establish a similar policy.

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[20] *Fla. Stat.* Chapter 458 (1970) (A. 246a-261a).

[21] *Fla. Stat.* Chapter 617 (1970) (A. 262a-269a).

Petitioner also argues that the right to a college education is a valuable property right and therefore a student has a right to an administrative hearing before he can be deprived of this right. (S. P. 17) He then cites *Connelly v. Univ. of Vermont and State Agr. Col.*, 244 F. Supp. 156 (D. Vt. 1965) for the proposition that if a student alleges that his dismissal was arbitrary, capricious or done in bad faith "a court can order an impartial hearing." (S. P. 17) Petitioner then points out that the court ordered such a hearing in *Connelly*.

While Respondent is not sure what relevance this argument has to Federal Question III Presented, in order that this Court not be misled it should be pointed out that the hearing referred to in *Connelly* was not an administrative hearing. In that case the appellate court merely upheld the trial court's denial of the university's motion to dismiss and remanded the case to the lower court so it could conduct a "hearing" on the allegations in the complaint and the defenses of the university.

Militana was given such a "hearing" in the instant case before the Dade County Circuit Court and at the close of all the evidence that court entered its finding that the University's dismissal of Militana was not done in bad faith. (A. 127a)

The *Dixon*[22] case relied on by Petitioner in his argument for the proposition that the right to continue an education requires a hearing prior to dismissal deals with a dismissal for *misconduct in a state university* and is therefore clearly not applicable in the instant case.

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[22]*Dixon v. Alabama State Bd. of Ed.*, 294 F.2d 150 (5th Cir.) *cert.den.* 368 U.S. 930 (1961).

FEDERAL QUESTION IV PRESENTED

Petitioner is apparently alleging in his argument under Federal Question IV Presented that since graduation from medical school is one of the requirements for eligibility to take the Florida license examination and since the licensing procedure is operated by a state Board of Medical Examiners, medical schools should be required to conform to the same standards of due process as state agencies.

The fallacy of this argument is readily apparent if it is carried to its logical conclusion. If private medical schools are bound by the Fourteenth Amendment because graduation from such a school is necessary to be eligible to receive a state medical license, then private colleges, high schools and even grammar schools should be within the purview of the Fourteenth Amendment as well, because graduation from each of these levels of education is a prerequisite for enrollment at the next level and therefore a necessary step in the process which culminates in the receipt of a medical license.

The link between attendance at a medical school and receipt of a state medical license which Petitioner seeks to rely on is not sufficient to justify the conclusion that the medical school is engaged in "state action." Understandably, Petitioner can cite no legal precedent in support of his position.

FEDERAL QUESTION V PRESENTED

Petitioner's contention in his Federal Question V Presented is that a state cannot delegate to the Association of Medical Colleges and the Council of Medical Education

and Hospitals of the American Medical Association the authority for determining the training requirements necessary for the granting of medical licenses under state law. Respondent submits that a proper interpretation of the relationship between the private medical regulatory bodies and the state licensing agency is not that the state has delegated certain responsibilities to these private organizations,[21] but rather that the medical profession has established certain internal controls to establish minimum levels of competence and conduct within the profession, and the state, in adopting regulations governing the licensing of medical doctors, has required that in order to be eligible for a license an individual must, *inter alia*, meet the minimum internal standards established by the medical profession itself.

Internal regulations of various professions, including lawyers and accountants, is an integral part of our society. Respondent submits that such internal regulation, even where it involves criteria which are considered by the appropriate state licensing agencies, does not constitute an unlawful delegation of state power.

FEDERAL QUESTION VI PRESENTED

Petitioner's final Federal Question Presented involves the question of whether certain federal and state laws are equally applicable to academic dismissals and dismissals based on misconduct. In response to this question, Re-

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[21]Petitioner does not cite the Court to any specific regulations delegating any sovereign authority to the private medical organizations he mentions.

spondent adopts the arguments made in Section "B" of its Brief in Response to Militana's Original Petition.[24]

In his argument on this point, Militana alleges that the facts are in dispute as to whether his dismissal was based on his academic performance or on alleged misconduct. However, the trial court specifically found that Militana's dismissal was based on his academic performance. (R. 128a)

Petitioner also raises the question of whether due process requirements should be different in private as opposed to public universities. Since Militana's dismissal was based upon his academic performance, under the law uniformly established by the lower courts he would not be entitled to a hearing even if the University of Miami was a public University. *Mustell v. Rose*, 282 Ala. 358, 211 So.2d 489, *cert. den.* 393 U.S. 936 (1968); *Dixon v. Alabama State Bd. of Ed.*, 294 F.2d 150 (5th Cir.), *cert. den.* 368 U.S. 930 (1961). Thus, with regard to the facts involved in the instant case, Militana's rights would not be different if the University was a state university rather than a private educational institution.

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[24]See pp. 20 - 26 of Respondent's Brief in Response to Petition for Writ of Certiorari.

CONCLUSION

Respondent respectfully submits that this Court does not have jurisdiction to grant the Writ prayed for herein because:

1) The court to which the Writ is sought to be directed is not the highest state court in which a decision could have been had,

2) The final judgment sought to be reviewed rests on independent and adequate state grounds,

3) The Questions Presented were not properly raised in the trial court, or on appeal, and

4) The Questions Presented do not raise federal questions since the University's dismissal of Militana was not "state action."

Respondent further submits that this Court should refuse to intervene in this matter because none of the Questions Presented by Petitioner have sufficient merit to warrant serious consideration by this Court.

Based upon the legal arguments and precedents cited herein, Respondent respectfully requests this Court to

deny Militana's Supplemental Petition for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief of Respondent was mailed to opposing counsel of record this ____ day of February, 1971.

AUBREY V. KENDALL